

State of California
California Regional Water Quality Control Board, Los Angeles Region

RESOLUTION NO. R4-2009-0XX

May 7, 2009

**Rescinding Resolutions R05-006 and R05-007, Which Incorporated the 2005 Versions of the
Los Angeles River and Ballona Creek Total Maximum Daily Loads into the
*Water Quality Control Plan for the Los Angeles Region***

WHEREAS, the California Regional Water Quality Control Board, Los Angeles Region, finds that:

1. On June 2, 2005, the Regional Board established, by Resolution Nos. R05-006 and R05-007, amendments to the Water Quality Control Plan for the Los Angeles Region (Basin Plan) incorporating Metals TMDLs for the Los Angeles River and for Ballona Creek. The TMDLs were subsequently approved by the State Water Resources Control Board in Resolution Nos. 2005-0077 and 2005-0078 on October 20, 2005 and by the Office of Administrative Law on December 9, 2005. The USEPA approved the TMDLs on December 22, 2005. The effective date of the TMDLs was January 11, 2006, when the Certificate of Fee Exemption was filed with the California Department of Fish and Game.
2. On February 16, 2006, the Cities of Bellflower, Carson, Cerritos, Downey, Paramount, Santa Fe Springs, Signal Hill, and Whittier (Cities) filed a petition for a writ of mandate challenging many aspects of the Los Angeles River Metals TMDLs and the Ballona Creek Metals TMDLs. (*Cities of Bellflower et al v. State Water Resources Control Board et al* (Los Angeles Superior Court # BS101732).
3. On May 24, 2007, the Los Angeles County Superior Court adopted the third of three rulings with respect to the writ petition. Collectively, all challenges to the TMDLs were rejected, except for one CEQA claim. Specifically, the Court ruled that the State and Regional Boards (Water Boards) should have adopted and circulated an alternatives analysis that analyzed alternatives to the project, pursuant to Public Resources Code section 21080.5 and section 3777 of Title 23 of the California Code of Regulations. Together, those authorities, which are applicable to the Water Boards' certified regulatory program, require that a project not be approved if there are feasible alternatives to the project that would substantially lessen a significant adverse effect that the activity may have on the environment. (Pub. Res. C. Section 21080.5(d)(2)(A).)
4. The Water Boards alleged that no feasible alternatives to the project existed that would result in less significant impacts to the environment, and noted that the Cities had not even suggested specific alternatives to the Water Boards during its proceedings. The Cities contended it was not their obligation to suggest alternatives, but the Court allowed the Cities a limited opportunity to brief a series of suggested alternative projects so the Court could consider whether they were feasible. The Court provided the Water Boards a similar opportunity to respond. Upon review of the briefs, The Court rejected the Cities' contention that a no-project alternative was feasible, as TMDLs are required by federal law. The Court rejected others of the Cities suggestions, but ruled that two of the Cities proposals were not intuitively infeasible based on the briefing. The Court ruled that the Water Boards have the burden of formulating and analyzing alternatives, and that since the Cities had identified in their briefs two "potentially feasible alternatives", the environmental documentation was deficient because the Water Boards did not conduct an adequate alternatives analysis. Accordingly, the Court issued its writ of mandate, directing the Water Boards to adopt an alternatives analysis that analyzed feasible alternatives to the TMDLs and reconsider the TMDLs accordingly. The writ was limited to that issue, and the TMDLs were affirmed in all other respects.
5. The Water Boards complied with the writ of mandate's direction to adopt an alternatives analysis and to reconsider the TMDLs in that light. On June 22, 2007, the Regional Board circulated a draft alternatives analysis for a 45-day comment period, and commenced the process of reconsidering the Metals TMDLs. The alternatives analysis examined all the alternatives suggested by the Cities in the litigation, as well as

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similar alternatives suggested to the Regional Board during other TMDL proceedings by these Cities and by other stakeholders. The alternatives analysis nevertheless concluded that none of the suggested alternatives were feasible alternatives that would both result in substantially less significant environmental impacts and would also achieve the projects' purposes.

6. Meanwhile, the Water Boards argued to the trial court that Public Resources Code section 21168.9(a)(3) gave the court discretion to allow the Water Boards to adopt an alternatives analysis, but to only void the TMDLs if it was otherwise compelled by CEQA. Specifically, the Water Boards should not be compelled to set aside the TMDLs if the alternatives analysis revealed no feasible alternatives exist that have substantially less significant impacts than the TMDLs that had already been adopted, or if the Regional Board determined that a statement of overriding considerations was appropriate. The Cities opposed the Water Boards' request. The trial judge questioned at the hearing whether he had the authority to allow the TMDLs to remain in place. On July 13, 2007, the court issued its final writ of mandate which required that the resolutions establishing the TMDLs be set aside.
7. After a public hearing, on September 6, 2007, the Regional Board reconsidered the TMDLs in view of the court's decision, the alternatives analysis that had been circulated, and the public comments received, and thereafter determined that no feasible alternatives exist that would achieve the project's purpose and also result in substantially less significant impacts to the environment than the TMDL as previously adopted. The Regional Board found that "[t]he alternatives analysis does not change the Regional Board's conclusion that feasible alternatives do not exist to the TMDL that would achieve the project's purposes and result in less significant impacts to the environment." The Regional Board further found:

"Considering the alternatives analysis, the Regional Board finds that the TMDL as originally proposed and adopted is appropriate. The Regional Board further finds that nothing in the alternatives analysis, nor any of the evidence generated, presents a basis for the Regional Board to conclude that it would have acted differently when it adopted the TMDLs had the alternatives analysis been prepared and circulated at that time."

The Regional Board therefore adopted the alternatives analysis, and readopted the TMDLs in Resolution Nos. R2007-014 and R2007-015 (Attachments A and B, hereto). Resolution Nos. R2007-014 and R2007-015 expressly superseded the original TMDLs that were the subject of the writ of mandate.

8. On or about September 28, 2007, the Cities appealed every part of the trial court's decision except the one issue on which they prevailed.
9. The Water Boards filed a limited cross-appeal, which was directed solely to the trial court's decision to order the TMDLs voided, and to clarify that the trial court does have the authority to impose a lesser remedy than ordering that the regulations be revoked. In filing the cross-appeal, the Regional Board considered that numerous NPDES permits had been issued that had already incorporated the waste load allocations from the LA River and Ballona Creek Metals TMDLs, and that revocation of the original TMDLs would render uncertain the enforceability of those effluent limitations. The Regional Board also considered the waste of public resources that would be occasioned by revising numerous permits, merely to revise findings showing that the effluent limitations are based upon the 2007 TMDLs instead of the 2005 TMDLs.
10. On April 3, 2009, the Second District Court of Appeal, Division 5, issued its decision in *City of Bellflower et al v. SWRCB et al*, No. B202660, and summarily rejected all of the Cities claims. The Court stated:

"The Cities contend that the trial court should have found [the] Regional Board's substitute EIR failed to set forth the reasonably foreseeable environmental impacts of compliance with the metals TMDLs and the reasonably foreseeable mitigation measures. We have examined the Cities' contentions and concluded that they are without merit. Therefore, we decline to address the specific contentions." (Slip Opn., p. 20.)

"In all cases, the sufficiency of the information contained in an EIR is reviewed in light of what is reasonably feasible. ... We conclude from our review of the substitute documents prepared by the Regional Board, as did the trial court, that the documents complied with the requirement to address the reasonably foreseeable environmental impacts from methods of compliance and set forth mitigation measures to minimize any significant adverse environmental impacts. The

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environmental review adequately examined and evaluated the environmental impacts of the proposed project in all pertinent areas of consideration and mitigation measures and mitigation measures, as would a first tier environmental review prepared under CEQA. This is not a case in which the Regional Board merely offered a checklist that denied the project would have any environmental impact and obviously intended its documentation to be the functional equivalent of a negative declaration (Cf. *City of Arcadia v. State Water Resources Control Bd.* [Trash TMDL Case]) Therefore, we reject the Cities['] additional contentions concerning CEQA violations." (Slip Opn., pp. 20-21.)

11. On the cross-appeal, the Court of Appeal agreed with the Water Boards that the court may elect not to void a regulation when it has found a CEQA deficiency:

"Section 21168.9 thus gives trial courts the option to void the finding of the agency (§21168.9, subd. (a)(1)), or to order a lesser remedy which suspends a specific project activity which could cause an adverse change in the environment (§21168.9, subd. (a)(2)), or to order specific action needed to bring the agency's action into compliance with CEQA (§21168.9, subd. (a)(3)). The choice of a lesser remedy involves the trial court's consideration of equitable principles." (Slip Opn., p. 18.)

The Court of Appeal, however, ruled that the trial court properly exercised its discretion, and upheld the decision to void the TMDLs.

12. The only outstanding requirement of the writ of mandate is to vacate Resolution Nos. R05-006 and R05-007.
13. A search of the Regional Board's records reveals that approximately 17 facilities (as described in Attachment C) are regulated with effluent limitations derived from the waste load allocations established by Resolution Nos. R05-006 and R05-007.

THEREFORE, be it resolved that:

1. Pursuant to the writ of mandate in the matter of *Cities of Bellflower et al v. SWRCB*, Los Angeles Superior Court No. BS101732, Resolution Nos. R05-006 and R05-007 are hereby voided and set aside.
2. Staff is hereby directed to examine the permits applicable to facilities described in Attachment C, hereto, and any other permits that have effluent limitations derived from the TMDLs established by R05-006 or R05-007, and bring back for the Regional Board's consideration such permit modifications as may be necessary to conform those permits to the requirements of the TMDLs established by Resolution Nos. R2007-014 and R2007-015.

I, Tracy J. Egoscue, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, Los Angeles Region, on May 7, 2009.

Tracy J. Egoscue
Executive Officer

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